no intention of abandoning his easement, and as the draining was not for purposes of repair, the right to lower the waters could have been denied upon the ground last stated.[26]

CY PRES DOCTRINE AS APPLIED TO CHARITABLE GIFTS.—The *cy pres* doctrine as to charitable gifts is in England applied not only by the Crown by virtue of its prerogative power as *parens patriae,* but also by Chancery in the exercise of its extraordinary but inherent equity jurisdiction.[1] Although in either case the rules of approximation to the donor's intention are similar,[2] the instances in which the powers are exercised are distinct.[3] Cases where the administration devolves upon the Crown are confined to those where no trust is interposed and the charitable objects are left wholly undefined, or become so through the failure of the object particularly designated.[4] Equitable jurisdiction on the other hand would seem to depend, in the orthodox view, upon the existence of a trust,[5] though the particular beneficiaries may be entirely indefinite.[6] In America it is the prevailing doctrine that our courts have no equivalent for the royal prerogative, and that *cy pres* administration is accordingly to be limited by the inherent powers of equity.[7] The foregoing distinction, however, is not recognized in New York, where the doctrine of *cy pres* is deemed wholly inapplicable,[8] and it has been overlooked or misapprehended in other States, where charitable gifts have been administered without the interposition of a trust.[9]

The *cy pres* application of a gift is the closest approximation to the original plan of the benefactor which is reasonably practicable.[10] It would seem, therefore, that since, where a gift is to "charity" *simpliciter,* the choice of objects is limited only by the legal definition of a charity,[11] the designation by the court of any charitable object whatsoever is a literal rather than an approximate fulfilment of the donor's intention. These cases, however, are as a matter of fact generally treated under the *cy pres* doctrine,[12] and the disposal of such bequests is to be governed by the testator's predilections so far as manifested.[13]

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[26]Smith *v.* Youmans *supra.*

[1]Moggridge *v.* Thackwell (1803) 7 Ves. Jr. 36, 86.

[2]Att'y Gen'l *v.* Mathews (1676) 2 Lev. 167; Moggridge *v.* Thackwell *supra,* 87.

[3]Moggridge *v.* Thackwell *supra.*

[4]Moggridge *v.* Thackwell *supra.*

[5]Ommaney *v.* Butcher (1823) Turn. & R. 260, 270; Att'y Gen'l *v.* St. John's Hospital (1865) 2 De G. J. & Sm. *621, *635.

[6]Lewis *v.* Allenby (1870) L. R. 10 Eq. *668; Harrington *v.* Pier (1900) 105 Wis. 485.

[7]Newson *v.* Starke (1872) 46 Ga. 88; Grimes *v.* Harmon (1871) 35 Ind. 198, 220; Dickinson *v.* Montgomery (Tenn. 1851) 1 Swan. 348; Hoffen's Estate (1888) 70 Wis. 522.

[8]Tilden *v.* Green (1891) 130 N. Y. 29.

[9]State *v.* Gerard (N. C. 1842) 2 Ired. Eq. 210; Howard *v.* Am. Peace Soc. (1860) 49 Me. 288, 302.

[10]Ingraham *v.* Ingraham (1897) 169 Ill. 432.

[11]Philpott *v.* St. George's Hospital (1859) 27 Beav. 107; *Re* Ashton's Charity (1859) 27 Beav. 115.

[12]Story, Eq. Jur., § 1169 *et seq.*

[13]2 Freeman, 261 (1702) 330-*b.*

Thus the court will consider not only the terms of his gift, but also such extrinsic evidence as his known religious beliefs,[14] his interest in a particular locality,[15] or in other charities.[16] Such uncertainty of beneficiaries may arise not only from design, but from ambiguity in their designation,[17] or from the fact that those designated are non-existent,[18] or that the donor has shown an intention to specify beneficiaries but has failed to do so.[19]

As indicated in the definition given above, however, the cases most typical of *cy pres* administration, strictly so called, are those where it is found necessary, not to supply merely the beneficiaries, but to make some deviation from the testator's original plan. There is of course no justification for varying the fundamental purpose of the donor,[20] and indeed the means directed for effectuating that purpose must be followed as far as practicable,[21] but since these means may rightly be regarded as subservient to the end in view,[22] they may be varied *cy pres* whenever they fail to fulfil their function.[23] Where mere details of administration are so varied,[24] the propriety of the change is clear, and, while not so obvious, it seems none the less possible in certain cases to regard a designated object as merely a mode of effectuating a broader charitable intention, and consequently as being open to modification *cy pres*. The latter situation was recently presented in the case of *Adams* v. *Page* (N. H. 1911) 79 Atl. 838, where a testator devised the residue of his property to trustees for the establishment and maintenance in a certain town of a hospital to be named for the donor. The residuary estate proved altogether insufficient for the purpose, and while the funds were accumulating in the hands of the trustees, a hospital was otherwise established in the same town. This was held to make the literal execution of the trust impracticable, and the trustees were accordingly directed to turn the fund over to the existing hospital for the maintenance of a ward to the donor's memory. But to justify this result it must be found that the testator had a broader charitable intention than to provide simply for the institution specified,[25] an element which is indeed difficult to discover, although the decision falls

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[14]*Re* Ashton's Charity *supra*.

[15]*Re* Mann, Hardy *v.* Att'y Gen'l L. R. [1903] 1 Ch. 232.

[16]Mills *v.* Farmer (1815) 1 Mer. 55.

[17]Simon *v.* Barber (1828) 5 Russ. 112; White *v.* White (1778) 1 Br. C. C. 12.

[18]Loscombe *v.* Wintringham (1850) 13 Beav. 87.

[19]Att'y Gen'l *v.* Siderfin (1683) 1 Vern. 221; So too a failure to name a trustee will be remedied. Baylis *v.* Att'y Gen'l (1741) 2 Atk. 239.

[20]If it proves impossible of accomplishment the gift fails and falls into the residue. Corbyn *v.* French (1799) 4 Ves. Jr. 418, 433; *Re* London Univ. Med. Inst. Fund (1908) 24 T. L. R. 820; Biscoe *v.* Jackson (1887) L. R. 35 Ch. Div. 460.

[21]See *Re* Lambeth Charities (1853) 22 L. J. Ch. 959; Att'y Gen'l *v.* Price (1908) 24 L. T. R. 763.

[22]Heuser *v.* Harris (1867) 42 Ill. 425, 434.

[23]Att'y Gen'l *v.* Vint (1850) 3 De G. & Sm. 704; White *v.* White *supra; In Re* Prison Charities (1873) L. R. 16 Eq. 129, 140, argument of counsel, n. 1.

[24]Ingraham *v.* Ingraham *supra*.

[25]Biscoe *v.* Jackson *supra*.

well within the precedents.[26] The early cases, indeed, went to a length which amounted to gross injustice and for a time brought the whole doctrine into great disfavor.[27] While there is no danger of such results from applications so conservative as that made in the principal case, they point out the latent dangers of a variation based on anything but the most candid investigation of intention.

The most serious criticism of the case, however, is that the literal execution of the trust does not appear impossible. Mere insufficiency of funds has been held not to constitute an obstacle,[28] and was obviously not so considered in this case. Although the duplication of hospitals in a small town is doubtless unfortunate it would seem to introduce an element not of impossibility but of inexpediency, which is not enough to justify a departure from the original plan.

STATUS OF BORROWING MEMBERS OF A BUILDING AND LOAN ASSOCIATION.—In the case of *Trustees of Mutual Loan Ass'n.* v. *Tyre* (1911) 81 Atl. 48, lately decided in Delaware, the receiver of the plaintiff association on its insolvency sought to foreclose a mortgage given to it by the defendant, one of its shareholders, as security for an advance of money from the company's funds, for legal interest, and for the instalments of dues usually paid by all members of such organizations. In adjusting the accounts between the parties, the court correctly held that the defendant was not entitled to credit on his loan the payments of dues, which, being made equally by all shareholders on their shares, ought accordingly to be distributed *pro rata* on insolvency.[1] The problem presented, however, was complicated by the system, typical of most building and loan associations, under which these advances were made. When the sums of money paid in, aggregate the par value of a single share of stock, the association is prepared *pro tanto* to lend a member the means to buy or build his home. Since, however, all the shareholders obviously cannot be supplied at the same time, this privilege is accorded at periodical distributions to the member who will pay the highest premium therefor, or in other words, will accept the smallest amount in satisfaction of the par value of the stock upon which the advance is made. In the principal case, the defendant was credited with the full amount of the premium and interest paid.

In considering the disposition to be made of this premium, the courts have reached inconsistent views as to the nature of the transaction. Thus, the premium has been justified as being paid either for the privilege of obtaining the loan,[2] or for the unusual length of time given for satisfying the advance.[3] Again, it is sometimes urged that the whole proceeding is in fact simply a dealing in partnership funds,

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[26]Att'y Gen'l *v.* Ironmongers Co. (1834) 2 Mylne & K. 576.

[27]Mills *v.* Farmer *supra;* Moggridge *v.* Thackwell *supra.*

[28]Grand Prarie Sem. *v.* Morgan (1898) 171 Ill. 444, 450.

[1]Preston *v.* Lamano (N. Y. 1905) 46 Misc. 304, approved in Preston *v.* Reinhart (N. Y. 1905) 109 App. Div. 781, affirmed in 185 N. Y. 555; Marion Trust Co. *v.* Trustees (1899) 153 Ind. 96.

[2]See Security Loan Ass'n *v.* Lake (1881) 69 Ala. 456.

[3]See Seventeenth Ward Ass'n *v.* Fitzgerald (1901) 8 Oh. N. P. 160.